OA 12-3-85

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IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,755

STATE OF FLORIDA, ET AL.,

Appellants,

vs.

WADE POWELL, ET UX., ET AL.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA OF ISSUE CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF APPELLEES WADE POWELL AND FREDA POWELL

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STATEMENT OF THE CASE AND FACTS

These Appellees adopt the trial court's Findings of Fact as their statement of the facts.

FINDINGS OF FACT

1. On June 15, 1983, James E. White, age 15, drowned while swimming in the Rainbow River at the Dunnellon City Beach in Marion County, Florida.

2. Plaintiffs Erwin and Susan White are the surviving parents and next of kin of James E. White.

3. The body of James E. White was taken to Munroe Regional Medical Center in Ocala, Florida, where defendant Keith Gauger, an investigator for the Medical Examiner's Office for the Fifth Medical Examiners District of the State of Florida, had a conversation with Erwin White prior to the body of James E. White being transferred to Leesburg, Lake City, Florida.

4. During that conversation, Erwin White inquired of defendant Gauger whether or not there was any indication of any foul play or any struggle and, according to Erwin White, was told by defendant Gauger that there was no such indication and that the death "... according to the police report and the rescue squad report was just a simple accident drowning...." (Deposition of Erwin White page 18, line 9, et seq.) After learning this, Erwin White advised

defendant Gauger that he did not want an autopsy performed on the body. Notwithstanding this objection to an autopsy, defendant Gauger advised Erwin White that an autopsy was required under state law. (Erwin White deposition page 17, line 7, et seq. and page 21, lines 1-22.) Defendant Gauger testified at his deposition that his recollection of this conversation was different from that of Erwin White.

5. That Assistant State Attorney James W. Phillips, sometime between April and October, 1983, made a request that autopsies be performed on all drowning victims in Marion County, Florida, and testified that his authority for this request was Section 925.09, Florida Statutes.

6. That Assistant State Attorney Phillips had no knowledge of the facts and circumstances surrounding the death of James E. White prior to the autopsy being performed on his body.

7. Notwithstanding the objection of Erwin White to the autopsy being performed on the body of James E. White, a full autopsy was performed by defendant Techman.

8. That defendant Techman did not know the corneae had been removed from the body of James E. White until it had been delivered to him in Leesburg, Florida, and the corneae were removed prior to the body being transported to Leesburg.

9. On July 11, 1983, at approximately 2:00 a.m., Anthony Wayne Powell, a 20 year old single male, and the son

of plaintiffs Wade and Freda Powell, was severely injured as a passenger in a motor vehicle collision. He was admitted to defendant, Munroe Regional Medical Center, at approximately 4:49 a.m. and pronounced dead at that time.

10. Plaintiff, Wade Powell, after being notified of his son's accident, identified the body of Anthony W. Powell at the hospital at approximately 5:15 a.m. on July 11, 1983, and thereafter he and his wife, Freda Powell, went into an adjacent waiting room where they remained until 7:30 a.m.

11. At approximately 6:30 a.m., the corneas of Anthony Wayne Powell were removed by a technician under the direction of defendant District Medical Examiner, William H. Shutze, at defendant, Munroe Regional Medical Center, while the plaintiff parents, Wade and Freda Powell, waited in an adjacent waiting room.

12. No one asked the plaintiff parents, Wade and Freda Powell, whether they had any objection to the removal of their son's cornea, or whether they consented to same.

13. Had they been asked, the plaintiff parents, Wade and Freda Powell, would have objected to and would not have consented to removal of their son's cornea.

14. At approximately 7:30 a.m., plaintiffs, Wade and Freda Powell, left the hospital, unaware their son's cornea had been removed.

15. That it is the policy of the Office of the Medical Examiner not to solicit objections to corneal removal or to advise next of kin of the intent to remove corneae.

16. That no one associated with the Office of the Medical Examiner knew of a patient in need of a cornea except that the Intervenor eye banks had disseminated information that there is always a need for corneae for transplant.

17. That one of the corneae removed from the body of James E. White was not used for transplantation but for some other purpose and the other was transported to the State of New York and transplanted into a patient in that state.

The plaintiffs/appellees filed actions seeking damages and a declaration that Section 732.9185, Florida Statutes, the statute pursuant to which the defendants acted in this case, is unconstitutional. That section provides:

> 732.9185 Corneal removal by medical examiners. --
>
> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> (a) A decedent who may provide a suitable cornea for the transplant is

> under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.
>
> (2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action or failure to obtain consent of the next of kin.

Both the plaintiffs and the defendants filed motions for summary judgment. The trial court granted summary judgment in favor of the plaintiffs, and held the statute unconstitutional.

The trial court found that, while the purpose of the cornea removal statute was commendable, it was invalid because it fails to meet constitutional requirements. The court noted that the statute was unconstitutional because it did not require notice to next of kin of the proposed removal, and did not require the consent of the decedent, while living, or the next of kin after death. The court found, among other conclusions, that:

> 2. That Florida Statutes 732.9185 -- "Cornea Removal Law," is facially unconstitutional for the following reasons:
>
> a. Plaintiffs have a right to receive, possess and dispose of the body of their sons in the same condition as his death left it, except for the results of a lawful autopsy.

b. This right is an intimately personal and fundamental one implicit in the concept of ordered liberty and may not be transgressed or interfered with by State action without a compelling state interest.

* * *

d. Section 732.9185 deprives plaintiffs of this right without affording them procedural or substantive due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution....

* * *

f. Removal of the corneae from the remains of their son without notice to them and without their consent and against their wishes and desires is an unconstitutional invasion of Plaintiff's rights of privacy under the 4th and 14th Amendments of the United States Constitution and Article I, Section 23 of the Constitution of the State of Florida. The right of Plaintiffs to receive, possess and dispose of the remains of their son in the same condition as death left them is an intimate personal right which is fundamental and implicit in the concept of ordered liberty. Moore v. City of Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed 2d 531 (1977); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed 2d 147 (1973); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed 2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed 2d 510 (1965); Sotto v. Wainwright, 601 F.2d 184 (5th Cir. 1979).

* * *

3. There is no compelling state interest in the removal of cornea from deceased persons, without consent from the next of kin, which outweighs the rights of the surviving next of kin to possession and disposition of the deceased's body in the same condition as when death occurred.

The Court's order granting summary judgment was entered on August 23, 1985. The State of Florida appealed, and the cause was certified to be of great public importance by the Fifth District Court of Appeal. This Court has handled the matter on an expedited basis.

SUMMARY OF THE ARGUMENT

The challenged statute authorizes medical examiners to remove corneas from decedents without first notifying next of kin of their intention to do so, without first inquiring whether there is an objection from next of kin, and without first requiring consent of next of kin to the removal. The intrusion authorized by the challenged statute violates substantive due process protections because the deceased's next of kin have a fundamental interest in their decedent's remains which is constitutionally protected. Like other recognized fundamental interests, it arises in the context of the family relationship. It embodies societal values and it is informed by religious beliefs. It involves matters of personal choice which should be exercised free from governmental interference. This interest may be variously described as a liberty interest, a privacy interest or as a property interest. The nature of the characterization is not of primary importance, because the interest described is, by its nature, unique. What is important is that this society, and in fact all society, has recognized the fundamental interest that the living have in the proper disposition of their dead.

The nature of the relationship between the family and the deceased cannot be determined without reference to religious and family values. The difference between the human cadaver and an animal carcass is seen as the

difference between what is sacred, hence what is to be treated with unfailing reverence, and that which is of value, and which may be utilized in any manner suited to its worth.

The description of the interest of the next of kin in their decedent's remains as a liberty interest does not totally define the interest involved. However, it serves to emphasize the traditional societal, personal and religious values involved, and it underscores the importance that such values have in the family's decision concerning the proper disposition of the remains. Religious objection is not limited to those who belong to an organized religion that has a standing objection to the removal of tissue or organs before burial. Even those who do not have a religious objection have a fundamental interest in their decedent's remains. This interest is fundamental because the decision concerning how a decedent's remains are to be treated is an important and personal choice for any family. The sanctity of the family is constitutionally protected because that institution is deeply rooted in our nation's history and tradition. It is through the family that we pass along many of our most cherished values, moral and cultural. The United States Supreme Court has long recognized that freedom of personal choice in matters of marriage and family is one of the liberties protected by the Constitution.

The challenged statute is an infringement of the fundamental interest the next of kin has in the decedent's

remains. By allowing the removal of corneas without reference to family preferences, the statute gives the government veto power over family values in this most important area. This intrusion violates the fundamental interest involved.

No compelling state interest exists to justify the government's intrusion. While it is laudable to restore sight to the blind, the government has a less restrictive alternative for doing so: voluntary donation. Most other states have not chosen the intrusive cornea collection scheme adopted in Florida. Sight can still be restored to the blind under a system of voluntary donation, although a less intrusive statute may reduce the supply of corneas and cause delays in transplant operations. That delay, even if it occurs, does not justify the intrusion on fundamental rights which the challenged statute authorizes.

The statute is also invalid because it denies the next of kin due process of law. The interest which the next of kin has in the decedent's remains is an interest sufficient to trigger due process protection. Once it is established that an interest sufficient to trigger due process protections exists, the inquiry shifts to whether or not the person with the protected interest received notice and opportunity to be heard in opposition to the proposed taking. The fundamental requirement of due process of law is notice and opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. The

challenged statute is invalid because, while it acknowledges the right to object, that right cannot be meaningfully exercised, given the statutory scheme. No notice is given to the next of kin that the decedent's corneas will be removed. No inquiry is made concerning objection. No meaningful opportunity exists for the next of kin to register their objection. Therefore, the statute is invalid, as it violates procedural due process restraints.

Finally, the trial court's order should be affirmed, and the statute invalidated, for the other reasons enumerated in the trial court's order.

ARGUMENT

I.

SECTION 732.9185, FLORIDA STATUTES IS UNCONSTITUTIONAL BECAUSE IT VIOLATES SUBSTANTIVE DUE PROCESS REQUIREMENTS.

The challenged statute authorizes medical examiners to remove corneas from decedents without first notifying next of kin of their intention to do so, without first inquiring whether there is an objection by next of kin, and without first requiring consent of next of kin to the removal. The statute provides that if the medical examiner knows of an objection he may not remove the corneas. However, since the right to object recognized by the statute cannot meaningfully be exercised in the absence of notice, for the purposes of determining whether the statute violates substantive due process protections, the issue is whether the Constitution prevents the government from removing corneas from a decedent over the objection of the decedent's next of kin.[1/]

The governmental intrusion authorized by the challenged statute is the removal of corneas from a deceased

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1/ This brief, of course, assumes that a decedent did not donate his corneas, before death, as provided by statute. The procedural due process considerations raised by the statutes failure to provide for notice and opportunity to be heard will be discussed in Issue II.

family member. The intrusion authorized by the challenged statute violates substantive due proceess protections because the deceased's next of kin have a fundamental interest in the decedent's remains which is constitutionally protected. Courts have had difficulties in defining this interest in commonly accepted commercial terms. That is not because it does not exist, but is because the fundamental interest that parents have in their dead child's remains cannot be adequately expressed in the terms we commonly use to describe commercial property.

The existence of a parent's fundamental interest in the remains of their dead child is a matter of common experience. This interest shares aspects of other, more widely recognized fundamental interests. Like other recognized fundamental interests, it arises in the context of the family relationship. It embodies societal values and it is informed by religious beliefs. It involves matters of personal choice which should be exercised free from governmental interference. This interest may be variously characterized as a liberty interest, a privacy interest, or as a property interest. The nature of the characterization is not of primary importance, since the interest described is by its very nature unique. What is important is that this society, and in fact all society, has recognized the fundamental interest that the living have in the proper disposition of their dead.

An examination of the history of that relationship is appropriate at this juncture because it underscores the fact that the interests involved here have always been viewed as fundamental by organized society. The trial court, in its order, recognized the fundamental values implicated here.

> Since the beginning of time man has regarded the control, possession and custody of the body and remains of a deceased family member as a basic and cherished right. There are deep religious, moral and philisophical beliefs and convictions upon which this view is predicated.

Order at 4.

As the trial court recognized, man's reverence for the dead has historical antecedents which date back to his earliest days. One of primitive man's fundamental beliefs concerning death was that of "animism," a belief that humans had souls or spirits distinct an separate from the body. Randall and Randall, "The Developing Field of Human Organ Transplantation," 5 Gonzaga L.Rev. 20, 22 (1969). Death was not considered an inseparable barrier to the ultimate reunion of body and soul. The relationship was viewed several ways. Some thought the soul hovered over the body, watching it decompose. Others believed in a vengeful spirit who would smite the living if the body was not properly buried. Id. Mutilation was considered, by some, as a process that could mean irreparable damage to the soul or the relationship of body and soul. As a consequence, early man was understandably relunctant to perform any act on the

body which might anger the spirit or hinder its possible resurrection. Id. at 23.

Egyptian thought carried over the "animism" concept in the practice of mummification. Id. In ancient Greece disection was looked down upon, due to a Grecian belief in the souls' ultimate reunion with the body. The Greeks believed that many gods tried to save a mortal but, if that failed, he would be sent to Hades were admittance was predicated upon presentation of a properly buried body which could be reunited with the individual's soul. Id. The Romans followed this belief and had great respect for the dead human body. Id. With the advent of Christianity the idea arose that there was something sacreligious about dissection, and the practice was not followed officially for almost a thousand years thereafter. Id.

This history demonstrates that the interest infringed in this case was recognized as fundamental in other places and at other times. The right at issue here is not a recent creation. The family has always had a strong interest in the proper disposition of the remains of their deceased family members.

The death of a family member has a severe impact on the family.

> Though a person's death is, of all that happens to him, that in which he is most alone, it always and everywhere arouses the strongest sort of social interest and initiates complex responses of communal activity, of which proper burial is one of the chief.

P. Quay, "Utilizing the Bodies of the Dead," 28 St. Louis L.J. 889, 900 (1984). The duty to see that the corpse is dealt with properly falls first upon the family, as the basic social group and the one containing those with whom the deceased had the closest natural bonds. Id. This duty of the family is heavily influenced by the religious beliefs of the deceased, the family, and the community. Id. at 901.

The nature of the legal relationship between the family and the deceased cannot be determined without reference to religious and family values.

> Most religions in the world hold that the remains of a deceased must be treated with honor and respect.

Kohn v. United States, 591 F.Supp. 568 (E.D.N.Y. 1984) aff'd 760 F.2d 253 (1985). The sense of the sanctity or sacredness of human remains is not restricted to any one religious tradition, or even to all collectively, though it may seem most at home in a religious context. Quay, supra, at 903.[2/]

2/ Mr. Justice Cardozo recognized the importance of this sanctity in Yome v. Gorman, 242 N.Y. 395, 152 N.E. 126, (1926), where the Court was called upon to decide if an injunction was properly issued against those who sought to prevent a wife from disinterring the body of her husband from a catholic cemetary and moving it to a plot in a non-catholic cemetary. He examined the competing interests of the society, church and family and declared:

> A benevolent discretion, giving heed to all those promptings and emotions that men and women hold for sacred in the disposition of their dead, must render judgment as it appraises the worth of the competing forces.

242 N.Y. at 402, 152 N.E. at 128 (1926).

The treatment to be accorded the corpse is of special importance in all families and to humanity at large. The deepest roots of the unconscious are touched by what is done or permitted to be done with human remains. Id. at 904.

> Yet we feel a great ambivalence when standing beside the corpse of a loved one. We somehow desire to see in those remains a weak yet true bond between ourselves and the person who died; but in fact the corpse seems more like a great stone door shut forever against his presence. Yet, even these remains, which we cannot recognize as truly human any longer, were once part of a man and still somehow share the imprint of his soul.
>
> There is a mystery here before which we stand unabashed and in awe. Not in spite of the mystery that is death but because of it, the corpse is entitled to reverence -- despite our awareness that what we revere is already decaying. Something at the roots of our own being demands that we treat the corpse with reverence.

Id. at 902.

The difference between the human cadaver and an animal carcass is seen as the difference between what is sacred, hence what is to be treated with unfailing reverence, and that which is of value, and which may be utilized in any manner suited to its worth. Id. at 903. That difference should not be ignored in this context. If we fail to take adequate account of traditional family values and treat cadaver tissues and organs simply as commercial property, we will chart a course for the future

which is fraught with danger. The use of cadavers as sources of tissues and organs needed for transplantation is not wrong. But how we decide when and how we will permit the government to obtain tissue and organs for transplant is one of the important ethical questions of our age.

The theological, moral and ethical questions raised by the taking of organs from human remains without permission of next of kin should not be swept aside in the constitutional analysis of he validity of statutes which authorize such takings.

> Is it only an unsophisticated aestheticism, or a reason more profound, that senses something possibly akin to cannibalism in the flying of a dying youth to a distant transplant center for use of his kidneys, liver, heart, lungs and skin? Such questions are hardly asked, let alone answered. The noisy rush to the scientific wonder of transplantation blurs the questions perhaps implicit in Sir Theodore Fox's admonition: "...We shall have to learn to refrain from doing things merely because we know how to do them."

D. Louisell, "The Procurement of Organs and Transplantation," 64 Northwestern L.Rev. 607, 622 (1970). It is in this context, not in the context of traditional notions of commercial property, that the fundamental nature of the interest infringed here must be defined.

A. The Decedent's Next Of Kin Have A Constitutionally Protected Religious Liberty Interest In His Remains.

The description of the interest of the next of kin in the remains of their deceased as a liberty interest does

not totally define the interest involved. However, such a description emphasizes the influence of traditional societal, personal and religious values on this interest, and it underscores the importance that such values have in the family's decision concerning the proper disposition of the remains.

The nature of the religious liberty interest infringed by the intrusion will necessarily differ from individual to individual, depending on belief. Although religious beliefs differ, it is a fair statement to say that individuals do object to removal of tissue and organs from their deceased family members on religious grounds. The orthodox Jewish position is perhaps the clearest. Deuteronomy 21:22-23 (the entire body should be interred).

> Judaism believes in the principle that body and soul are sacred because both are the handwork of God and hence are entitled to reverence. [Citations omitted.] In accordance with this premise Jewish law teaches that the whole body should be buried, and that if the parts have been removed, for examination or otherwise, they must be returned and buried with the whole body.

Kohn v. United States, 591 F.Supp. 568 (E.D.N.Y. 1984) aff'd 760 F.2d 253 (1985). In Kohn, the Court examined the law in the United States concerning the rights of the next of kin in the deceased's remains and concluded:

> In other words the next of kin have an interest in the respectful treatment of the corpse, and in the case of those holding the views such as plaintiffs, an interest akin to that protected by the First Amendment.

591 F.Supp. at 573 (emphasis added).

Religious objection is not limited to those who belong to an organized religion that has a standing objection to the removal of tissues or organs before burial.

> Although there may be no formal objection by the different religious authorities to removal of organs from cadavers from transplantation, individuals may object to removal of organs on the ground that it violates their own religious beliefs. A fundamentalist Christian, for example, might believe organ removal is inconsistent with the principle of bodily resurrection, even though Catholic theologians are to the contrary. A Jehovah's Witness or a Christian Scientist might object to the shedding of blood or the surgical operation. Or a person might have some unorthodox eschatological belief which would be offended by removal.

Sanders and Dukeminier, "Medical Advance and Legal Lag: Hemodyalysis and Kidney Transplantation," 15 UCLA L.R. 357, 406-407 (1968).

The religious interests present here are similar to, and at least as compelling as, those at issue in Wisconsin v. Yoder, 405 U.S. 205, 92 S.Ct. 1526, 23 L.Ed. 15 (1972). In Yoder, the Court held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who graduated from the eighth grade, to attend formal high school at age 16. Chief Justice Burger, writing for the Court, noted that the state has the power to make reasonable regulations for the control and duration of basic education. However, the Court found

that the regulation at issue there impinged on fundamental rights and interests. The Court struck it down.

Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court found that a state statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interests of parents in directing the rearing of their offspring, including their education in church-operated schools. The Court found the values of parental direction of the religious upbringing and education of children has a high place in our society.

The situation presented here is similar to Yoder and Pierce in several respects. Both involve the relationship between parent and child and both involve important aspects of religious belief. The decision which should be protected from governmental veto in this case is not how the child should be educated in preparation for life. It is the more traumatic decision of the proper preparation of the child's remains in death. The interests involved in this decision are no less fundamental than those involved in Yoder and Pierce.

Even Sanders and Dukeminier, who proposed the adoption of the type of statute which is challenged here, (15 UCLA L.Rev. at 410-413), recognized the dangers to religious freedom posed by statutes which authorize the government to take tissues and organs without consent.

> Any system for salvaging cadaver organs must provide a mechanism whereby either the donor or the next-of-kin can object to the procedure. Were it not to do so, grave constitutional problems respecting freedom of religion might be raised.

Sanders and Dukeminier, "Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation," 15 UCLA L.Rev. 357, 407 (1968) (footnote citing Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963) omitted.)[3/]

Therefore, it is clear that the next of kin have a liberty interest in their deceased which is constitutionally protected. The consequences of such protections are clear.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Wisconsin v. Yoder, 406 U.S. at 215, 92 S.Ct. at 1533.

The next of kin have a constitutionally protected liberty interest in the remains of their deceased even in cases where religious beliefs are not involved. That interest will be discussed in the following section.

3/ Sanders and Dukeminier believed the inclusion of a section in the statute providing that removal was not permitted if an objection was known to the person doing the removal cured this problem. In fact it does not, because the statute provides for no procedure for objection which would satisfy procedural due process requirements. For further discussion of that deficiency see Issue II, infra.

B. The Decedent's Next Of Kin Has A Liberty/Privacy Interest In His Remains.

The description of the fundamental interest that next of kin have in the remains of their deceased family member as a liberty interest emphasizes the importance of personal choice by the family concerning how their decedent's remains should be treated. However, in order to fully describe the interest, it necessary to recognize that other societal values are implicated as well. The sanctity of the family is protected because that intitution is deeply rooted in our nation's history and tradition. It is through the family that we pass down many of our most cherished values, moral and cultural.

The United States Supreme Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by Due Process Clause of the Fourteenth Amendment. Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796, 39 L.Ed. 2d 52 (1974) A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). See, e.g., Roe v.

Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727, 35 L.Ed. 147 (173); Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed. 2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 2d 551 (1972); Ginsberg v. New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed. 2d 195 (1968); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965); id., at 495-496, 85 S.Ct. at 1687-1688 (Goldberg, J., concurring); id., at 502-503, 85 S.Ct. 16 1691-1692 (White, J., concurring); Poe v. Ullman, 367 U.S. 497, 542-544, 549-553, 81 S.Ct. 1752, 1776-1777, 1780-1782, 6 L.Ed. 2d 989 (1961) (Harlan, J., dissenting), cf. Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967); May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 85 L.Ed. 1655 (1942).

Of course, the family is not beyond regulation. See Prince v. Massachusetts, supra, 321 U.S. at 166, 64 S.Ct. at 442. However, regulations which intrude upon fundamental interests must meet a compelling state interest, and must not be achievable by a less restrictive alternative.

Substantive due process is not easy to define. Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 (1961) has often

been quoted in subsequent Supreme Court opinions which discuss due process. He stated:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> ... [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press; and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the

> state needs asserted to justify their abridgment.

367 U.S. at 542-43, 81 S.Ct. at 1776-1777 (dissenting opinion).

In Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 2d 531 (1977) (plurality opinion) the Court struck down an ordinance which limited occupancy of a dwelling to members of a single family and recognized as a family only a few categories of related individuals. The Court found that the ordinance, under which it was a crime for a homeowner to have living with her a son or grandson plus a second grandson who was a cousin of the first grandson, violated substantive due process constraints. If discussed the doctrine.

> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and], solid recognition of the basic values that underlie our society." Griswold v. Connecticut, 381 U.S., at 501, 85 S.Ct., at 1691 (Harlan, J., concurring). See generally Ingraham v. Wright, 430 U.S. 651, 672-674 and nn. 41, 42, 97 S.Ct. 1401, 1413-1414, 51 L.Ed. 2d 711 (1977); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-163, 71 S.Ct. 624, 643-644, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); Lochner v. New York, 1988 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

431 U.S. at 503-04, 97 S.Ct. at 1937-38.

The fundamental interest that the next of kin has in the decedent's remains is similar in many respects to the other interests that the Court has recognized as fundamental. The Court has found rights to personal privacy in connection with activities relating to marriage, Loving v. Virginia, 388 U.. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967) and Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 85 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-54, 92 S.Ct. 1029, 1038-39, 31 L.Ed. 2d 349; abortion, Roe v. Wade, supra; family relationship, Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); the non-nuclear family relationship, Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 2d 531 (1977) (plurality opinion); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 299, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

The theme which runs through all these cases, and which compels the invalidation of the statute challenged here, is the protection, from governmental interference, of the right of free choice in decisions of fundamental importance to the family. The statute in this case permits

government veto of personal choice in an area of fundamental importance to the family. It authorizes the removal of corneas without inquiry concerning objection, and provides for immunity for the medical examiner who removes the cornea should it turn out the family's choice concerning removal was that no removal should have been permitted. This intrusion violates the "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). Therefore, the challenged statute is unconstitutional.

C. No Compelling State Interest Exists To Justify The Government's Intrusion And The State Has A Less Restrictive Alternative For Achieving Its Objective Of Restoring Sight To The Blind.

There is no dispute that it is laudable to restore sight to the blind. However, the state's interest in restoring sight to the blind is by no means absolute to the exclusion or subordination of all other interests. The record indicates that the appellants have overstated the damage which will result if the cornea removal statute is invalidated.

First, the Florida statute must be put into national perspective. Only eight states (including Florida) allow the removal of corneal tissue under the same circumstances as Florida: no known objection, but no duty

to inquire concerning an objection by next of kin.[4/] The other states that have adopted cornea removal statutes require more than "no known objection." Arizona and California permit removal after a "diligent" unsuccessful attempt to contact next of kin. Ariz. Rev. Stat. Ann. §§ 36-851 to 852 (Supp. 1975-1983); Cal. Health & Safety Code § 7151.6 (West Supp. 1984). Seven states require both a reasonable search and no known objection: Delaware, Del. Code Ann. Tit. 29 § 4711 (1983); Louisiana, La. Rev. Stat. Ann. § 17: 2354.1 to: 2354.2 (West 1982), § 33.1561.1 (West Supp. 1984); Maryland, Md. Est & Trusts Code Ann. §§ 4-509 to - 509.1 (Supp. 1983); Massachusetts, Mass. Gen. Laws Ann. Ch. 113 § 14 (West Supp. 1984-1985), Tennessee, Ten. Code Ann. §§ 68-30-201 to -203, 68-30-301 to - 303 (1983); Utah, Utah Code Ann. § 26-4-23 (Supp. 1983), and Washington, Wash. Rev. Code Ann. §§ 68.08.300, .305 (Supp. 1984 - 1985). North Carolina requires either a belief that their are no next of kin or a reasonable search. N.C. Gen. Stat. § 130A-391 (Supp. 1983). Four states require actual permission for removal. Ill. Rev. Stat. Ch. 110½ § 351(b);

4/ The states, other than Florida, which have such statutes are Georgia, Ga. Code Ann. § 31-23-6 (1982); Kentucky, Ky. Rev. Stat. § 311.187 (1983); Michigan, Mich. Comp. Laws Ann. § 333.10202 (Supp. 1984-1985); Ohio, Ohio Rev. Code Ann. § 2108.53, 60 (Page Supp. 1983); Texas, Tex. Rev. Civ. Stat. Ann. Art. 4590-4 (Vernon Supp. 1984); and West Virginia, W. Va. Code § 16-19-3a (Supp. 1984).

N.Y. Pub. Health Law § 4222 (McKinney Supp. 1983-1984); Okla. Stat. Ann. Tit. 63 § 2212 (West Supp. 1983-1984); Va. Code § 32.1-282 (Supp. 1984).

Therefore, it cannot seriously be argued that, if the statute is not upheld, sight can no longer be restored to the blind in Florida. In fact, Florida is one of only eight states which have chosen the highly intrusive cornea collection system at issue here. Twenty-eight states have no cornea removal statute. Fourteen states require at least diligent search for objection by next of kin, if not actual consent. Therefore, the statute at issue here must be seen for what it is: a convenience for the transplant industry which the industry does not generally enjoy elsewhere.[5/]

This is not to say that cornea transplants do not have a beneficial effect on the society. However, since corneas are shipped around the country for transplant, and our statute provides an ample supply, it appears that the constitutional rights of Floridians could be compromised to provide corneas to residents of states which have not made adequate provision for the supply of corneas to their

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5/ The term "industry" may seem inappropriate due to the good work being done by the health care professionals and dedicated volunteers who are hard at work in this area. It is used to stress the fact that supply and demand are facts of life in the business of transplanting tissues and organs, just as they are in other areas of the economy. In balancing the need for organs with sources of supply, this Court should not permit itself to be moved only by concepts of efficiency and commercial value.

citizens, or which have rejected the intrusive cornea supply system adopted in Florida.[6/]

The evidence in the record on the dramatic effect of legislation on cornea transplants is not particularly helpful because it does not allow the Court to assess how much of the dramatic advance which is described is due to technology, and how much is due to particular legislation. The contention that "medical examiner legislation" is responsible for dramatic benefits does not justify the challenged statute because it ignores the fact that most states do not permit the type of unconstitutional intrusion currently permitted by the Florida statute.

One other point should be stressed in discussing the absence of a compelling state interest. The transplant of corneas differs in several important respects from the transplant of vital organs, and for that reason this case does not present some of the harder questions that could be posed by other cases. First, cornea transplants are simpler than transplants of vital organs. They don't require a brain-dead donor and recipient. No matching of tissue is required, as with vital organs. In fact, almost every decedent is a suitable donor. Therefore, the supply

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6/ The record reflects that one of the corneas removed in this case was shipped to New York for transplant. The New York Cornea Removal Statute requires consent, hence there is less chance that a surplus of corneas will exist there.

problems presented in cornea transplants are not as critical as those presented in the case of the transplant of vital organs. Second, the time factors involved in cornea transplants are not as critical as in the case of the transplant of vital organs.

> The time factor can become a prohibitive condition for some types of transplant operations. Critical organ tissue, such as the heart, kidney, lung and liver must be removed from a deceased donor within minutes of death. It must be transplanted within hours. Certain non-critical tissue, such as that in the skin and cornea, can be removed after a greater length of time and still be used.

Wheeler, "Anatomical Gifts in Illinois," XVIII De Paul L.Rev. 471, 473 (1969) (emphasis added). Third, the recipient will not die if he does not receive a cornea, while a recipient might die if he does not receive a vital organ. That is not to say that a delay in bringing sight to a blind person is not serious. The point is that consequence lacks finality which often characterizes the potential vital organ recipient's plight.

In the case of vital organs, the need is greater and the time frames for decisions are shorter. What is the law on vital organ transplants in Florida? There is no authorization permitting the taking of vital organs without notice. In fact, consent is required. The area is governed by Section 732.912, Florida Statutes, which permits the decedent's family to make a gift of the organs, but requires

the consent of next of kin (priorities are established in the statute). In addition, the statute provides that no gift may be made by the spouse if any adult son or daughter objects. This requirement promotes family decisions. The statute further provides that if persons of lower priority wish to make a gift of the organ, persons of higher priority, if they are reasonably available, must be contacted and made aware of the proposed gift so they will know they must register an objection if they have one. Finally, the statute specifically requires a "reasonable search" to determine "that there would have been no objection on religious grounds by the decedent." Section 732.912(2). Clearly, these important protections are as necessary in the case of cornea removal statute as they are in connection with the removal of other tissues or organs. Why is infringement permitted in the case of corneal removal?

Infringement cannot be justified on the ground that the intrusion into the cadaver is greater in the removal of vital organs than it is in the removal of corneas. The infringement is not measureable in terms that govern tortious injuries to the living. The family's protected liberty/privacy interest is invaded by taking corneas no matter how slight the physical intrusion required to do so. For the same reason, the infringement cannot be justified on the basis that corneas are only removed when autopsies are performed, on the theory that the cadaver is

otherwise affected. Since the interest is constitutionally protected, no intrusion beyond which is necessary to perform the autopsy is permissible.

The statute must also fall because there is a less restrictive alternative which will achieve the government's interest of restoring sight to the blind: voluntary donation. The elimination of the challenged statute may lower the supply of corneas for transplant and thus delay transplants.[7/] However, that fact does not constitute a compelling state interest sufficient to justify the governmental intrusion on the fundamental right involved here.

For the reasons stated, the next of kin have a fundamental interest in their decedent's remains which is violated by Section 732.9185, without sufficient justification. Therefore, the statute violates substantive due process restraints and is unconstitutional.[8/]

7/ If more corneas are needed under a voluntary system, perhaps they will be available from Georgia, where a Florida-style statute was just upheld by the state supreme court.

8/ If the Court finds that the statute violates substantive due process restraints it need go no further. If the Court does not find the interest involved sufficiently fundamental to establish a violation of substantive due process, it should consider whether the statute violates procedural due process requirements. That issue follows.

II.

SECTION 732.9185, FLORIDA STATUTES, IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PROCEDURAL DUE PROCESS.

It is well settled that the government may not deprive presons of life, liberty, or property without due process of law. What are "liberty"[9/] and "property" for the purpose of determining which interests are entitled to protection from government deprivation without due process of law? "Liberty" within the meaning of the due process clause:

> denotes not merely freedom from bodily restraint but also the right of the individual ... generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). The Supreme Court has noted that "[i]n a constitution for free people, there can be no doubt that the meaning of 'liberty' must be broad indeeed." Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). Liberty interests are generally

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9/ The "liberty" interest discussed in the context of procedural due process is the same as that discussed in the previous issue. Even if the liberty interest involved here is not "fundamental" and therefore beyond the reach of governmental interference except for the most compelling reasons, it is nevertheless guaranteed a measure of protection from government deprivation. This issue will discuss the protection guaranteed if the liberty interest involved here is not fundamental.

thought of as having constitutional origin, but they may also arise from state law. Vitek v. Jones, 445 U.S. 480, 488-91, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980) (state law afforded prisoner liberty interest in avoiding transfer to mental hospital absent fulfillment of specified standards); Morrissey v. Brewer, 408 U.S. 471, 480-82, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972) (state law granted prisoner conditional liberty interest in parole); Enomoto v. Wright, 462 F.Supp. 397, 402-403 (N.D. Cal. 1976) (state law granted prisoner liberty interest when transferred to solitary confinement for disciplinary or administrative reasons), aff'd 434 U.S. 1052 (1978).

"Property" interests, for due process purposes, typically are not created by the constitution, but rather arise from an independent source such as state law. See Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). See generally Tribe, "Structural Due Process," 10 Harv. C.R. - C.L. Rev. 269, 275-83 (1975); Note, "Statutory Entitlement and the Concept of Property," 86 Yale L.J. 695 (1977). Thus, tangible and intangible interests, as well as legitimate claims of entitlement to a benefit or status protected by state law for those meeting or maintaining specified qualifications, have been considered protected by due process. See, e.g., Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed. 725 (1975)

(public school attendance); Goldberg v. Kelly, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970) (welfare benefits).

Here the plaintiffs, as next of kin of their decedent child, have an interest in the child's remains which can be variously described as a liberty or property interest. Although the precise nature of the interest at issue here is difficult to describe in traditional commercial terms, it is well established.

> Since the most ancient of times people had a reverent regard for the remains of their loved ones, especially of children for their parents and parents for their children; and this naturally includes an ardent desire that their remains be treated with respect and allowed to remain in undisturbed peace and rest.

In the Matter of Estate of Moyer, 577 P.2d 108, 110 (Utah 1978). The appellants fail to recognize the parents' rights in their child's remains because they ignore the importance, to ordinary people, of the rights at issue here.

The Florida cases which bear on this question and have been analyzed in the appellants' briefs.[10/] This Court, in those cases, described the relationship in property terms, although a description of the interest in terms of liberty would also be correct. All three cases

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10/ This Court's opinions in Dunahoo v. Bess, 200 So.541 (Fla. 1941), Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) and Jackson v. Rupp, 238 So.2d 86 (Fla. 1970) are the leading Florida decisions in this area.

hold that the plaintiffs there, the next of kin of their decedents, had causes of action against defendants who acted in a wrongful manner with regard to their decedents. The cases permit causes of action for negligent embalming, for refusing to surrender the remains of the decedent to the next of kin, and for unauthorized autopsy. These results are generally in accord with the case law in this area through the nation.

The current state of the law in this area is summarized in Wasmuth and Stewart, "Medical and Legal Aspects of Human Organ Transplantation," 14 Cleveland-Marshall L.Rev. 442, 455-56 (1965).

> The prevailing view in the United States is that although there is no property right in the commercial sense, there are certain rights vesting in the nearest relative of the deceased. These rights arise out of the duty of the relatives to bury their dead. It includes the right to possession and custody of the body for burial, and the right to maintain an action to recover damages for any indignity or injury done to the corpse.

(footnote citing Kirksey v. Jernigan omitted). Accord 22 Am. Jr. 2d Dead Bodies § 4 at 558 ("notwithstanding there can be no property right in a dead body in the commercial sense, there is a quasi-property right in dead bodies vesting in the nearest relatives of the deceased and arising out of their duty to bury the dead.") (footnote omitted).

The description of the right as a "quasi-property" right recognizes is that the next of kin do not have the same incidents of ownership of the decedent's remains which

they would in ordinary property. The owner of ordinary property can dispose of it, abandon it, sell it or improve it. The next of kin's rights in the deceased are strictly limited. It is because the next of kin of a deceased has responsibilities to the deceased that he has rights.

> ... the right to possession of a dead body for purposes of burial has been described as a "quasi-property" right in the nature of a "sacred trust" that a court will uphold as a result of natural sentiment, affection and reverence. "It would be more accurate to say that the law recognizes property in a corpse but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise."

Jackson, The Law Of Cadavers And Of Burial And Burial Places (1950) 133 (footnore omitted). Jackson, at the outset of his treatise, acknowledges the difficulty one encounters when attempting to use common law doctrines to describe the legal relationships in this area. This was not an area of English common law jurisdiction. Since the time of William the Conqueror, it was left to the spriritual authorities and the Ecclesiastical Courts. Societal and religious concerns are still significant considerations in this area. Strict adherence to notions of commercial property will prevent, rather than facilitate, clear formulation of legal relationships.

> When we look to our own substantive law for precedents, we find our courts, in dealing with matters of cadavers and their care and disposition, failed to appreciate the inapplicability of common law doctrines. Nor did they realize

> that in the determination of this question they were not concerned with property rights, but were dealing with sentimental matters affecting domestic relations. Failing in this recognition and bound by habit, they sought assistance in common law decisions in the law of contracts and of real property. They found little precedent, but using what they found as guides they wrestled with sentimental problems as though these turned upon rules respecting property. The results, where just, defy the syllogisms of logic, and sometimes the honesty of the reasoning has bred shocking consequences.

Jackson, supra, at lxxxv.

While the nature of the interest of the next of kin in a deceased relative is not easily described, it seems to have attributes of both liberty and property, and the interest, however described, is sufficient to trigger procedural due process protection. The contrary position, that the body belongs to the state at death, could lead to frightening consequences. If the state owns the dead, what would prevent the taking of any organ from any decedent at any time, despite the wishes of the family? The benefits of organ and tissue transplants are well recognized and socially accepted. However, when stripped of the protections which should be guaranteed, the decedent's body could be used for less noble purposes than the provision of sight or the saving of life.

Once it is established that an interest sufficient to trigger due process protections exists, the inquiry shifts to whether or not the person with the protected

interest recieved notice and opportunity to be heard in opposition to the proposed taking. The fundamental requisite of due process of law is notice and opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). The hearing must be at a meaningful time and in a meaningful manner. Id. The challenged statute is invalid because while it acknowledges the right to object, it is designed to preclude objection. No notice is given to the next of kin that the decedent's cornea's will be removed. No inquiry is made concerning objection.

It appears that the decision to draft the statute so as to permit the removal of corneas without consent and without inquiry concerning objection by next of kin was intentional. The idea for such statutory scheme was advanced in Sanders and Dukeminier, "Medical Advance and Legal Lag: Hemodyalysis and Kidney Transplantation," 15 UCLA L.Rev. 357 (1968). There, the authors recognized that the law in most states at that time of the article required permission of next of kin as a condition precedent to removal of organs. They believed that such a state of affairs was "plainly unsatisfactory." Id. at 411.

> The change in the law we propose is simply to change the condition precedent of consent to a condition subsequent of objection where organs are to be removed from a cadaver. The basic question is who shall have the burden of action -- the surgeons seeking consent, or the donor (before his death) or his next of kin objecting.

Id. at 412. The proposal they advanced was that "cadaver organs could be routinely removed unless there were some objection entered before removal." Id. at 413. No procedure for objection was proposed. This scheme was advanced as a method of securing a greater supply of cadaver organs. This is the approach adopted in the Florida cornea removal statute, and it has resulted in an increase in the number of corneas available for transplant.

Two other authors who played a considerable part in the original drafting of the proposed Uniform Anatomical Gift Act suggest that the Sanders and Dukeminier approach is improper. Sadler and Sadler, "Transplantation and the Law: The Need for Organized Sensitivity," 57 Geo. L.J. 5 (1968). They state:

> The fact is that it would be more macabre and unacceptable to allow any surgeon to remove an organ or tissue upon death without having an obligation to give notice ot anyone. It is difficult to imagine public acceptance of such a proposal.

Id. at n. 138. Other commentators have joined in the criticism of this approach.

> An examination of the Act, however, shows that, in contrast to the careful spelling out of the ways by which a positive making of an anatomical gift can be valid, no mechanism or procedure whatever is provided for ascertaining a refusal of donation. It is no small procedural flaw that an act governing the supposedly free gift of someone's cadaver makes no provision for refusal by the decedent and only inadequate provision for refusal by the next of kin.

Quay, "Utilizing Dead Bodies" 28 St. Louis University L.J. 889, 891 (1984).

The fact that no inquiry is required concerning whether the next of kin objects is also criticized in Groll and Kerwin, "The Uniform Anatomical Gift Act: Is the Right to a Decent Burial Obsolete?" 2 Loyola University (Chicago) L.J. 275, 299 (1971).

> ... there is no duty whatever, on anyone's part, to search for a contrary indication, so as to almost totally preclude actual notice of that indication. While the provision allowing the opposition by a [family] member seems superficially to be an adequate buffer against rash action by others in contravention of dead men's wishes, it cannot be held so; for, once again, no one is duty-bound to ascertain whether any opposition members exist.

The provision in the challenged statute that the next of kin can object if he somehow knows to do so does not pass constitutional muster under established notions of procedural due process. The availability of an unknown opportunity to register an objection that the public would not expect would be necessary in the first instance can hardly be described as constitutionally sound. Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977) presents an analogous situation. There, the Department sought to reclassify, from one level of care to another, elderly medicare recipients who were confined in nursing homes. The Department placed the burden of proof in the reclassification hearings on elderly

recipients who were confined in nursing homes because they were unable to care for themselves. The First District, citing Goldberg, held that "it is hardly consistent with fundamental concepts of fairness" to place the burden of proving entitlement to nursing home care on those who have been found to be unable to care for themselves.

It is clear that the statute fails to provide a meaningful opportunity for next of kin to object to removal of corneas from the decedent. Therefore, the challenged statute fails to satisfy procedural due process requirements.

III.

THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED FOR THE OTHER REASONS SET FORTH WITHIN IT.

The challenged statute should be held invalid for the other reasons set forth in the trial court's order.

CONCLUSION

For the foregoing reasons, the trial court's order should be affirmed and Section 732.9185, Florida Statutes, should be declared unconstitutional.

Respectfully submitted,

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